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HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 176

WATERMAN STEAMSHIP CORPORATION,
a corporation,
Petitioner,

vs.

TRIPLE A MACHINE SHOP, INC.,
a corporation,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.**

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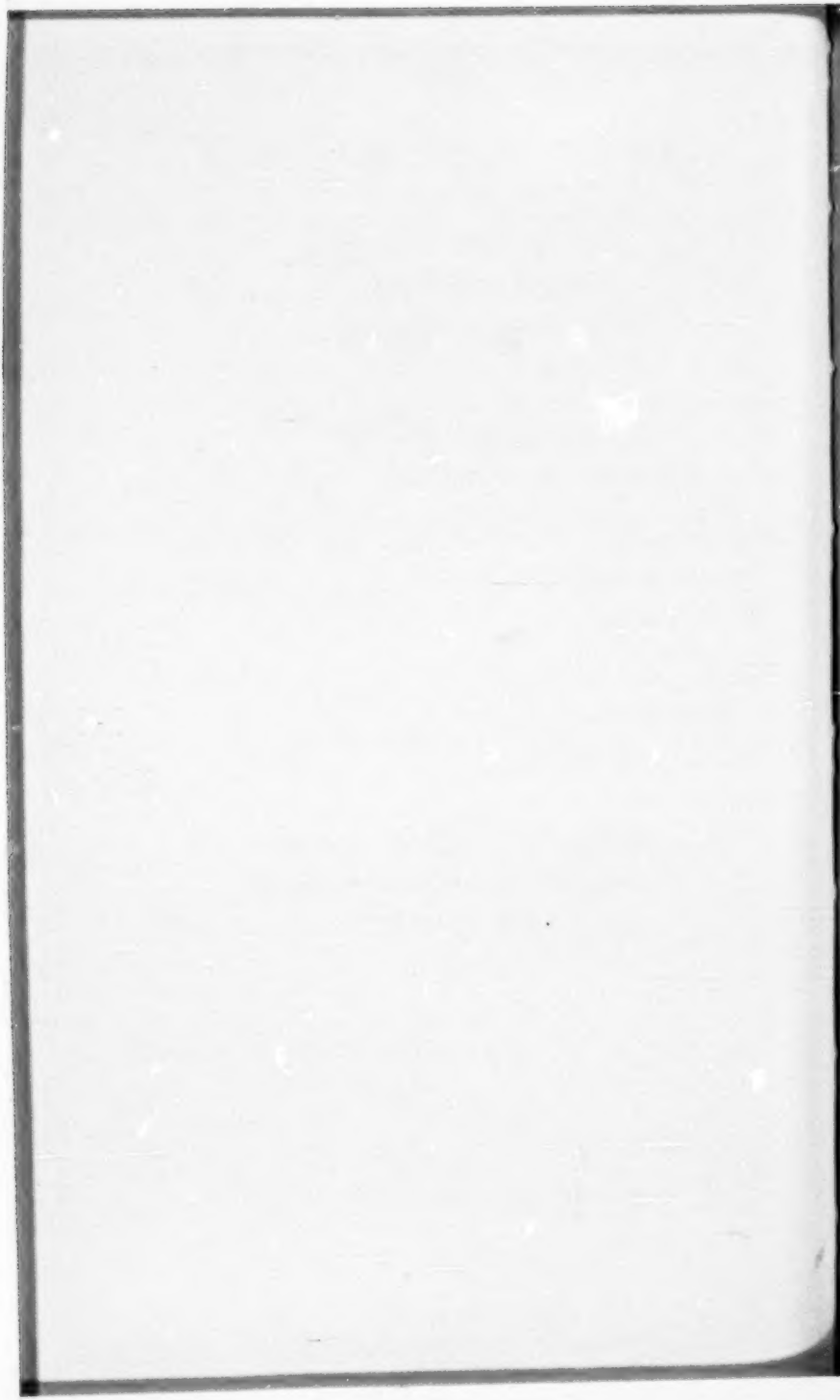

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OPINIONS BELOW.

The opinion of the Court of Appeals, appearing at page 166 of the certified record, was rendered and filed on April 25, 1955, is set forth in the appendix hereto, and is reported at 221 Fed. 2d 916.

JURISDICTION.

(a) The judgment of the Court of Appeals for the Ninth Circuit reversing the interlocutory decree of the District Court for the Northern District of California, Southern Division, was dated and entered on April 25, 1955.

(b) Petition for rehearing, timely filed on May 23, 1955, was denied by the Court of Appeals on May 31, 1955. The Court of Appeals has stayed its mandate pending the filing and consideration of this petition for writ of certiorari but no extension of time within which to file this petition for certiorari has been sought or granted.

(c) Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals by Title 28 USC 1254(1), this petition for certiorari being filed within the time prescribed by Title 28 USC 2101(c).

QUESTION PRESENTED.

The primary question presented for review is whether an appeal in admiralty where the testimony before the District Court was in part oral and in part by deposition may be treated by the Court of Appeals as a trial de novo, or whether the standard of review as stated in Rule 52(a) of the Federal Rules of Civil Procedure, which treats trial court findings as final in the absence of clear error, applies to admiralty cases as well as other civil cases. There is a conflict on this question in the opinions of this Court and in the opinions of the Courts of Appeal for the several maritime circuits, some of which hold that findings of the trial court may be set aside only if clearly

erroneous, while the Ninth Circuit holds that an admiralty appeal results in a trial de novo.

If the courts of appeal in admiralty cases may exercise no greater scope of review than that permitted under Rule 52(a) of the Federal Rules of Civil Procedure in civil cases, the further question is presented whether the Court of Appeals in the present case exceeded such permissible scope of review in rejecting the findings made by the trial court based on uncontradicted substantial evidence and in substituting therefor other inferences based on testimony rejected by the trial court.

No secondary question is presented if the Court of Appeals may properly treat an admiralty appeal as a trial de novo, for in such event no contention is made that the Court of Appeals erred in a question of law.

STATEMENT OF THE CASE.

Petitioner, owner of the SS JEAN LAFITTE, brought this action to recover damages suffered by it, including detention and general average items, resulting from a fire aboard the vessel at San Francisco, August 2, 1952. Jurisdiction of this admiralty matter was vested in the District Court under Article III, Section 2 of the United States Constitution and Title 28 USC 1333(1); jurisdiction of the Court of Appeals existed under Title 28 USC 41, 1292(3), 1294 and 2107 respondent having filed its notice of appeal within fifteen days from the entry of the District Court's interlocutory decree in petitioner's favor.

Before 6:00 P.M. on August 1, 1951 at the Oakland Army Base on San Francisco Bay, the No. 1 hold of the SS JEAN LAFITTE had been completely loaded with bales of Army clothing and the hatch closed with pontoon-type covers and covered over with canvas tarpaulins but not battened down (R. 15).* On the following day, August 2, 1951, at about 5:00 P.M., the vessel having shifted across the bay to San Francisco, respondent's employees commenced work at the after end of No. 1 hatch to install a winchman's platform, using an oxy-acetylene torch to burn through two angle bar railings and an upright which were located on the main deck immediately aft of No. 1 hatch. At about 7:00 P.M. and after they had completed the burning operation but before they had installed the winchman's platform, respondent's employees discovered there was a fire in the No. 1 hold. Upon removal of the pontoon hatch covers, as testified by the Fire Department Battalion Chief (R. 60), the fire was discovered in the very top level of the cargo of Army clothing at the middle of the after hatch coaming directly adjacent to the place where respondent's employees had been burning with an oxy-acetylene torch and directly under an aperture between the after pontoon and after hatch coaming through which sparks would have fallen to the cargo unless the aperture remained covered by tarpaulins (photographs R. 157, 159, 160).

Petitioner at the trial before the District Court produced substantial oral evidence which negatived smoking by longshoremen on the previous day before the hatch

*Numbers in parentheses refer to pages of the printed record, petitioner having elected to file copies herewith under Rule 21(4).

was closed and evidence which eliminated as reasonably possible causes of the fire all causes except the oxy-acetylene burning performed by respondent's employees shortly before the fire was discovered. The deposition testimony of respondent's employees as to the manner in which they performed the work of burning would, if believed, have similarly excluded it as a cause of the fire, but the trial court rejected the testimony of respondent's employees because of critical conflicts in their testimony on other points, and accepted instead the contrary inference arising from petitioner's evidence.

The Court of Appeals on its reading of the record was not satisfied that the fire had not been caused by a cigarette butt dropped by a longshoreman at the Oakland Army Base on the previous day, although all testimony in the record negatived this possibility, and additionally inferred that sparks had not entered the hold because there were no burns on the tarpaulins (despite the fact that it would have been physically impossible for sparks entering the hatch to have burned the tarpaulins if, as inferred by the trial court, the tarpaulins at that time had been pulled forward on the pontoons).

The Court of Appeals did not find that either the judgment or the findings of the District Court were clearly erroneous but based its reversal of the District Court on the reweighing and re-evaluating of the testimony heard and considered by the trial court and treated the matter as a trial de novo. The Court of Appeals, as on a trial de novo, concluded, "* * * we think that the shipowner did not sustain its burden of proof that the fire injuring the ship's structure was started by the use of the acetylene torch."

ARGUMENT.

(a) UNCERTAINTY AS TO PROPER STANDARD OF REVIEW IN ADMIRALTY APPEALS.

The Court of Appeals for the Ninth Circuit in the present case treated its review of the trial court's judgment and findings as a trial de novo and reversed the District Court, even though it was not determined that the judgment or findings of the District Court were clearly erroneous.

There is a substantial divergence among the circuits as to the proper scope of review to be applied by a court of appeals in an admiralty case. Additionally, the apparent direct conflict between this Court's earlier opinions on the subject and its most recent expression requires settlement and clarification by this Court of the proper standard of review to be applied in admiralty appeals.

(1) Conflict among Supreme Court cases.

This Court's most recent expression as to the proper standard of review to be applied in an admiralty appeal appears in *McAllister v. United States* (1954), 348 U.S. 19, in which this Court stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

Rule 52(a) F.R.C.P. in pertinent part provides:

"(a) • • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

Conversely in *Brooklyn Eastern District Terminal v. U.S.A.* (1932), 287 U.S. 170, 176, and after the adoption of Admiralty Rule 46½ in 1930, this Court stated:

"In admiralty an appeal to the Court of Appeals is deemed to be a trial de novo."

A trial de novo is defined:

"Trial de novo: A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." *Black's Law Dictionary*, 3rd Edition, page 1756.

Prior opinions of this Court similarly stated that an admiralty appeal was treated as a trial de novo in the Court of Appeals, *Irvine v. The Hesper* (1887), 122 U.S. 256; *Watts, Watts & Co. v. Unione Austriaca di Navigazione* (1918), 248 U.S. 9; *Reid v. Fargo* (1916), 241 U.S. 544; cf. *McCrea v. U. S.* (1935), 294 U.S. 382.

Clarification and settlement by this Court is required as to whether by its decision in the *McAllister* case it intended to place admiralty appeals on a precise parity with appeals in civil cases.

(2) Conflict among the circuits.

The several maritime circuits have expressed the standard of review to be applied in an admiralty appeal as follows:

First Circuit: Expressly acknowledges standard stated in F.R.C.P. 52(a) that findings of the trial court may be

set aside only if clearly erroneous. *Boston Insurance Co. v. Dehydrating Process Co.* (1953), 204 Fed. 2d 441, 444.

Second Circuit: Expressly acknowledges standard stated in F.R.C.P. 52(a). *Petterson Lighterage & Towing Corp. v. New York Central Railroad Co.* (1942), 126 Fed. 2d 992, 995; *Union Carbide & Carbon Corp. v. United States* (1953), 200 Fed. 2d 908, 910.

Third Circuit: The standards of review applied in the Third Circuit are stated in *Crist v. U. S. War Shipping Administration,* 163 Fed. 2d 145, 146:

> "• • • an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the District Courts; that the findings of the latter when supported by competent evidence are entitled to great weight and that such findings should, therefore, not be set aside on appeal except upon a showing that they are clearly wrong. *The S.C.L. No. 9,* 3 Cir., 114 Fed. 2d 964, 966. The basis of the latter rule is 'that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witnesses' demeanor which the cold print of the record fails to disclose'. *The S.C.L. No. 9,* supra. The rule is modified where the findings of the district court are based wholly on depositions. *Matson Nav. Co. v. Pope & Talbot, Inc.,* 9 Cir., 149 Fed. 2d 295."

Fourth Circuit: The standard of review applied by the Court of Appeals for the Fourth Circuit is stated in *Hodges v. Standard Oil Co. of New Jersey* (1941), 123 Fed. 2d 362, 363:

> "There is no better established principle of admiralty law than that questions of fact, resolved by a trial judge on conflicting evidence, are entitled to great

weight and will not be reversed except for plain error."

Fifth Circuit: Expressly acknowledges standards stated in F.R.C.P. 52(a). *C. J. Dick Towing Co. v. The Leo* (1953), 202 Fed. 2d 850, 854.

Sixth Circuit: The Sixth Circuit appears to acknowledge standards of review substantially the equivalent of those stated in F.R.C.P. 52(a) in *Wilkes v. Mississippi River Sand & Gravel Co.* (1953), 202 Fed. 2d 383, 387:

"• • • this court is bound by the findings of fact of the District Judge, if they are supported by substantial evidence and are not clearly erroneous • • •"

Seventh Circuit: Although the Court of Appeals for the Seventh Circuit for many purposes apparently regards an admiralty appeal as a trial de novo, it also tacitly acknowledges the standards of review as stated in F.R.C.P. 52(a), as stated in *Kroehler v. United States* (1951), 187 Fed. 2d 933, 936:

"Hundreds of citations might be given where the rule is categorically stated that on an appeal in admiralty there is a trial de novo; however, the qualification of that general rule is just as widely recognized, and that is, that the findings of the district court will be accepted by the appellate court unless clearly against the preponderance of the evidence."

Ninth Circuit: The Court of Appeals for the Ninth Circuit, has variously stated the standard of review to be applied in admiralty cases as in *U. S. v. Wilhite* (1947), 1948 AMC 687, and *Kulukundis v. Strand* (1953), 202 Fed. 2d 708. Despite the language in *City of Long Beach,*

et al. v. American President Lines (9 Cir. decided June 14, 1955, not yet reported), the Court of Appeals for the Ninth Circuit subsequent to the decision of this court in the *McAllister* case has not consistently applied to admiralty cases the standards of review stated in FRCP 52(a). As recently as December 14, 1954 the Court of Appeals for the Ninth Circuit in *City of Portland v. Luckenbach SS Co.,* 217 Fed. 2d 894, 897, indicated that in an admiralty case it was free to set aside the findings of the trial court on a belief of error "something short of clearly erroneous".

The present case, decided April 25, 1955 in which six of the eight witnesses were heard by the trial court and only two by deposition confirms that the Court of Appeals for the Ninth Circuit has not accepted in admiralty cases the standards of review stated in F.R.C.P. 52(a).

The standard of review applied in admiralty cases by the Court of Appeals for the Ninth Circuit is as stated in the following quotation from respondent's brief filed with the Court of Appeals in the present case:

> "The leading case on the weight to be accorded the trial Court's findings in an admiralty appeal is this Honorable Court's decision in *The Ernest H. Meyer,* 84 F. (2d) 496 (9 Cir. 1936). That case laid down the rule as follows:
>
> > 'The well established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence. In so weighing the evidence, it is not weighed with the end in view of determining whether a part of the evidence war-

rants an inference supporting the finding. We must weigh *the whole evidence* • • • In such weighing of the evidence we are required to make our independent "examination, thought and judgment" just as did the Supreme Court in *The Ariadne,* 13 Wall. 475, 20 L. Ed. 542.' 84 F. (2d) at pp. 500-501. (Emphasis by the Court.)

"*The Ernest H. Meyer* also points out that where the testimony is largely by deposition, the presumption in favor of the lower Court's findings is of lesser weight and more easily rebutted.

'The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification in the sound judgment of the appellate court.' *Matson Navigation Co. v. Pope & Talbot,* 149 F. (2d) 295 at 298 (9 Cir. 1945).

'In *U. S. v. Lubinski,* 9 Cir., 153 F. (2d) 1013, 1014, where "the testimony was partly oral and partly by deposition," we said, "we give weight to the findings of the trial court as our judicial discretion dictates." The evidence before us being both oral and documentary, we apply the same rule as in a case where the "testimony was partly oral and partly by deposition," and give such weight to the findings as our judicial discretion dictates.' *Tawanda v. U. S.,* 162 F. (2d) 615 at 617 (9 Cir. 1947)."

It is apparent that the Ninth Circuit in admiralty appeals gives less effect to the judgment and findings

of the trial court than do the First, Second and Fifth Circuits and probably less than the Third, Fourth, Sixth and Seventh Circuits. The scope of review applied by the Court of Appeals for the Ninth Circuit in admiralty cases patently exceeds the standard sanctioned by literal reading of the Supreme Court's opinion in the *McAllister* case, supra.

The question of the standard of review in admiralty cases is an important one which requires settlement and clarification by this Court, for as matters now stand either the First, Second and Fifth Circuits are too stringently limiting their review in such cases or the Ninth Circuit is reviewing such cases on too broad a basis, with the possibility that the First, Second, Fifth and Ninth Circuits may all be in error and the proper standard be an intermediate one as expressed in the Third, Fourth, Sixth or Seventh Circuits.

(b) THE COURT OF APPEALS IN THE PRESENT CASE ERRED IN REVERSING THE TRIAL COURT IF IN AN ADMIRALTY APPEAL THE PROPER STANDARD OF REVIEW IS AS STATED IN RULE 52(a) FEDERAL RULES OF CIVIL PROCEDURE AND NOT AS ON A TRIAL DE NOVO.

If an appeal in an admiralty case presents the case to the Court of Appeals as on a trial de novo, the present case presents no error of sufficient general interest to merit review by this Court on certiorari.

On the other hand, if the proper standard of review in an admiralty appeal is as stated in F.R.P.C. 52(a) and as indicated on a literal reading of this Court's opinion in the *McAllister* case, the error in the standard of review applied by the Court of Appeals in the present

case is a grave one which highlights a diversity in federal admiralty law as applied by the different circuits and which requires correction by this Court and corresponding settlement and clarification to prevent the recurrence of such errors and the taking of appeals in admiralty cases in reliance on the assumption that such appeal may afford a review in the nature of a trial de novo.

In the present case, the trial court found that the evidence excluded all reasonably possible causes of the fire with the single exception of the negligence of respondent's employees. In the factual context of the case the trial court found that respondent's employees had raised a tarpaulin during their work permitting sparks of incandescent metal produced by oxy-acetylene burning to fall through an aperture between the after pontoon and the after hatch coaming onto the cargo in No. 1 hold causing the fire in question.

The trial court found that smoking by longshoremen in the hold on the previous day before the hatch was closed was not a reasonably possible cause of the fire in view of the substantial evidence that Army regulations prohibited smoking in the holds and adjacent areas of vessels loading at the Oakland Army Base (R. 72), that military police vigorously enforce such regulations (R. 20), that longshoremen do not smoke on vessels at the Oakland Army Base (R. 15) and that none was seen to smoke during the loading of the vessel (R. 15). The Court of Appeals reviewed the record de novo and rejected the trial court's finding which was based on substantial evidence and substituted in lieu thereof the finding that there was a "not remote possibility that a long

smouldering fire was started by a burning cigarette butt dropped by one of the fourteen stevedores" before the hatch was closed on the previous day, although there was no evidence that any longshoremen had smoked.

Similarly, the Court of Appeals from the evidence that there were no burns on the tarpaulins which had been used to cover No. 1 hatch inferred that no sparks from the oxy-acetylene burning operation had gone over the hatch or entered the hold through the aperture between the pontoon cover and the hatch coaming. As the photographs (R. 157 and 159) clearly show, the hatch pontoon cover extended some six to seven inches above the top of the hatch coaming (and above the aperture between the hatch coaming and the pontoon). Contrary to the "required inference" on which the Court of Appeals bases its reversal of the trial court, the absence of burn marks on the tarpaulins not only does not tend to prove that sparks did not enter the hold to cause the fire but in fact it *was physically impossible for the spark or sparks which caused the fire to touch the tarpaulin* when the tarpaulin was thrown back on top of the hatch as inferred by the trial court from the substantial evidence excluding all other reasonably possible causes of the fire.

It is not our purpose to suggest that this court should weigh the relative merit of the inferences drawn by the District Court and by the Court of Appeals. We urge only that the standard of review applied by the Court of Appeals in the present case in reversing the trial court was erroneous if the proper standard of review permits the judgment and findings of the trial court to be set aside only if clearly erroneous.

CONCLUSION.

In light of the considerations hereinabove expressed, it is respectfully submitted that certiorari should be granted in the present case to settle and clarify the standard of review in admiralty appeals and to settle conflicts presently existing among the circuits; it is further respectfully submitted that at the present day there is no reason for admiralty appeals to be subject to a different standard of review than other civil cases and that accordingly the decision of the Court of Appeals should be reversed being erroneously founded on a review by the Court of Appeals of the District Court's findings and judgment as on a trial de novo.

Dated, San Francisco, California,
June 21, 1955.

CHALMERS G. GRAHAM,
Proctor for Petitioner.

GRAHAM, JAMES & ROLPH,
FRANCIS L. TETREAULT,
Of Counsel.

CERTIFICATE OF SERVICE.

I, CHALMERS G. GRAHAM, Proctor for Waterman Steamship Corporation, Petitioner, and a member of the bar of the Supreme Court of the United States hereby certify that on the 21st day of June, 1955, I served copies of the foregoing Petition for Writ of Certiorari on proctors for respondent by mailing copies to their office in duly addressed envelope with first-class postage prepaid.

Dated, San Francisco, California,
June 21, 1955.

CHALMERS G. GRAHAM

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

TRIPLE A MACHINE SHOP, INC., a corporation, *Appellant*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Appellee*.

No. 14,268
Apr. 25, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge, and ORR and CHAMBERS, Circuit Judges

DENMAN, Chief Judge:

Appellant, hereafter the repairer, appeals from a decree in admiralty holding it liable to appellee, hereafter the shipowner, for negligently causing a fire in the Number 1 hold of its steamship, JEAN LAFITTE, while it was at Pier 15 in the harbor of San Francisco. The vessel had been loaded in the Number 1 hold on the day before with Army clothing and supplies at an Army dock in the harbor of Oakland, Alameda, California. The negligence found is that the repairer's two employees, in using an acetylene torch to burn off and remove an iron upright welded to

the deck just aft of the Number 1 hatch handled it in such a manner that its sparks entered through the hatch, into Number 1 hold and started a fire in bales of the military clothing wrapped in gunny sacks and thereby damaged the structure of the vessel.

The repairer contends that the shipowner has not produced evidence to sustain its burden of proof that the proximate cause of the injury to the ship was by the torch's sparks entering the hold through an aperture, admittedly the only method by which the torch could have caused the fire in the gunny-wrapped clothing.

It is not questioned that under and a few feet from where the torch was used there was an aperture between the steel hatch coamings and the hatch edge. If not otherwise covered, sparks could have reached the gunny wrapping of the bales of clothing, that is, assuming the torch were used so that its sparks were forced towards the aperture. There is testimony, heard by the court, that there was an overall covering of the hatch consisting of three layers of tarpaulin (tarred canvas), the flaps of which hung down the side of the walls of the hatch to the deck. It is not questioned that if these were not raised or the sparks had not burned holes through them, they could not have entered the hold.

There was testimony also that the hold of this privately owned vessel had been open late in the previous afternoon when its loading by some fourteen stevedores was completed and that the fire could be started by a burning cigarette butt dropped by one of them. Such smoking was forbidden by the Army on all cargo vessels in the Army dock. The stevedore foreman saw no stevedore smoke

while he was there during the previous day but stated that he was absent a part of that time on shore, when a fire well could have been started by such a dropping of a burning cigarette butt on the gunny cloth. The testimony is that a fire so started in the gunny would smoulder many hours before it burst into flame.

The record is barren of testimony that the tarpaulin cover of the hatch was raised during the time the torch was used in its vicinity. Highly significant is the failure of the shipowner to offer evidence of the condition of the *inside* face of the hanging flap of the tarpaulin next to the repairmen which must have been turned over on top of the hatch to uncover the aperture through which the torch's sparks would have to pass to reach the inflammable gunny sacking beneath. Had the repairmen pointed the torch in such a way as to enter the hold its sparks most likely would have shown burning marks on the tarred inner surface of the flap.

In depositions of the repairer's two employees who used the torch, they testified that they used it while on the hatch side of the steel upright they were cutting, pointing the torch away from the hatch and that the triple tarpaulin was at no time raised while they were there. Their testimony that they used the torch pointing it away from the hatch is corroborated by undisputed evidence that there was a careful examination of the *outside* of the tarpaulin by another witness and that no burned hole appeared on its tarred surface.

The shipowner contends that the court must have rejected *all* this deposition testimony because the two repair men testified that the burned clothing was not under where

they were working, while photographs showed it was under them. However, assuming that this testimony is rejected, there still is no evidence that the tarpaulin was raised, and the testimony of another witness that he and other persons examined the tarred canvas surface and found no spark holes in it requires the inference that the torch was pointed away from and not over the hatch and that no sparks entered the hold.

With the not remote possibility that a long smouldering fire was started by a burning cigarette butt dropped by one of the fourteen stevedores and the absence of any testimony that the tarpaulin was raised we think that the shipowner did not sustain its burden of proof that the fire injuring the ship's structure was started by the use of the acetylene torch.

The judgment is reversed.

(Endorsed:) Opinion. Filed Apr. 25, 1955.
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

TRIPLE A MACHINE SHOP, INC.,
a corporation,
Appellant,

vs.

WATERMAN STEAMSHIP CORPORATION,
a corporation,
Appellee.

No. 14,268

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant, and against the Appellee.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellant recover against the Appellee for its costs herein expended and have execution therefor.

(ENDORSED) Judgment

Filed and Entered: April 25, 1955.
PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 31, 1955

Before: DENMAN, Chief Judge, ORR and CHAMBERS, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee, filed May 23, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

FILED
JUL 21 195
HAROLD B. WILLEY,

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 176

WATERMAN STEAMSHIP CORPORATION,
a corporation,
Petitioner,

vs.

TRIPLE A MACHINE SHOP, INC.,
a corporation,
Respondent.

BRIEF FOR RESPONDENT TRIPLE A MACHINE SHOP, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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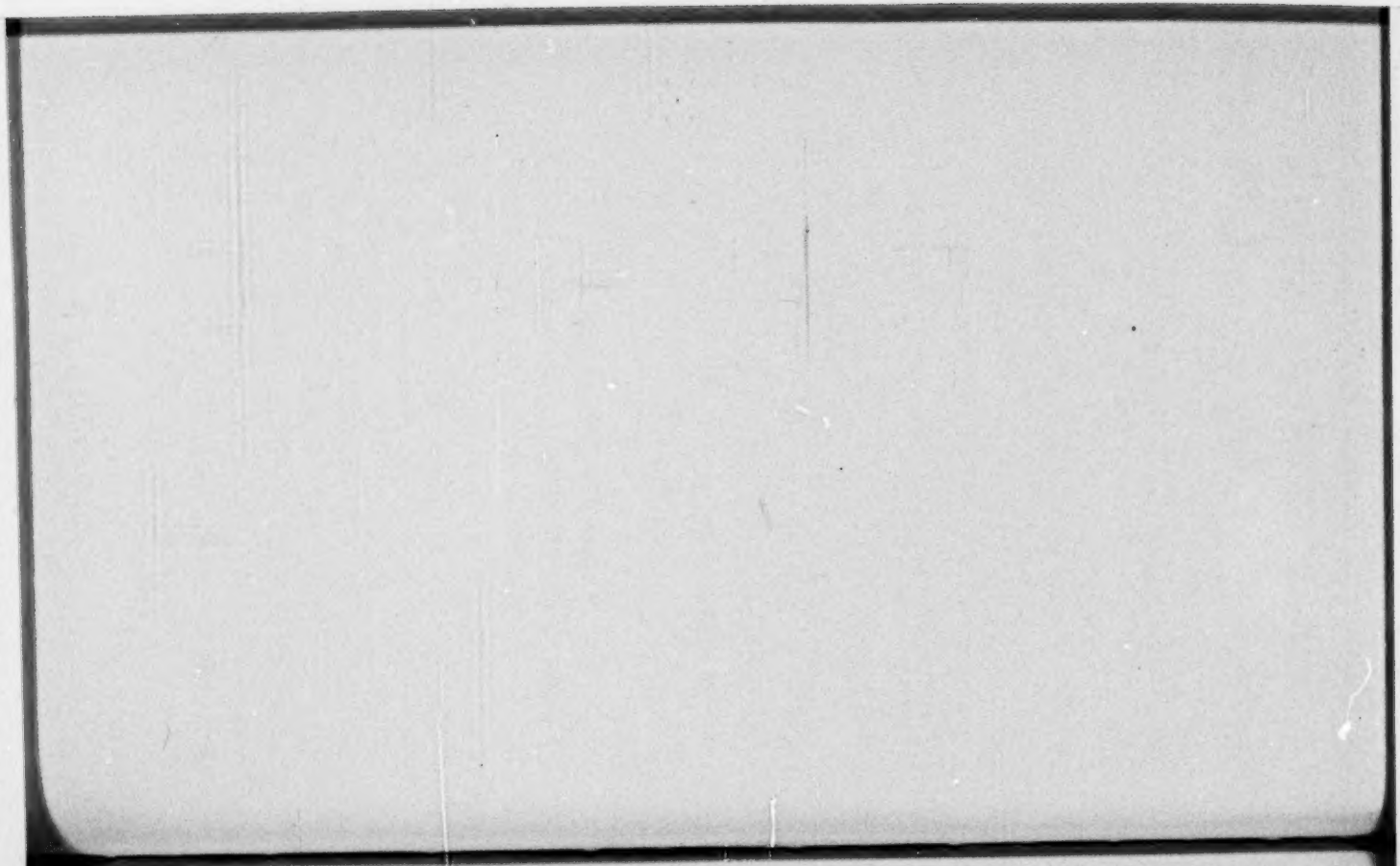

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In the Supreme Court
OF THE
United States

October Term, 1955

No. 176

Waterman Steamship Corporation,
a corporation,
Petitioner,
vs.
Triple A Machine Shop, Inc.,
a corporation,
Respondent.

BRIEF FOR RESPONDENT TRIPLE A MACHINE SHOP, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner's statement of the case is correct in its recital of jurisdiction, and in its general outline of the basic facts. It over-states the evidence relied upon by petitioner in the trial court, however, and omits to mention the basic evidence on which the Court of Appeals reversed the Dis-

trict Court's finding that respondent's negligence caused a fire in #1 hold of the JEAN LAFITTE. Petitioner's statement of the case concludes with an erroneous and unwarranted characterization of the ruling of the Court of Appeals. To complete a fair picture of the case, we offer the following:

It is undisputed that, at *all* times prior to discovery of fire in #1 hold, the hatch was covered with "pontoons." These are hollow box-shaped structures of steel laid side by side on ledges inside the hatch coaming, so that they fill up the hatch, leaving only narrow cracks between pontoons and between the after-most pontoon and the after coaming of the hatch. (Barkman, R. 17-18.)

It is also undisputed that, at the time the fire was discovered in #1 hold, these pontoons were completely covered with three heavy tarpaulins, which were then pulled out of the way in order to lift the pontoons and get at the burning cargo beneath them. (Doepfner, R. 45-6.) It was conceded that petitioner arranged for the tarpaulins to be spread out and examined the day after the fire, and that there were no holes or burn marks in any of the tarpaulins to show that sparks from respondent's operation on deck had gone through the tarpaulins to start a fire in the cargo. (Miller, R. 122-3.)

Throughout this case it was respondent's position that the tarpaulins covered the hatch during respondent's work, so that sparks from the burning operation on deck could reach the cargo in #1 hold *only* by burning their way *through the tarpaulins*. Since the tarpaulins were found whole and unharmed after the fire, the conclusion was inescapable that respondent's work was not and could not have been the source of the fire.

Petitioner has contended throughout that the absence of holes or burns in the tarpaulins is immaterial, because respondent's workmen "must have" rolled them back while they were working, and then replaced them when the work was finished. The burden of proof on this issue rested on petitioner, of course, since petitioner alleged that respondent's negligence caused the fire.

Although petitioner thus had the burden of proof to show that the tarpaulins did not cover the hatch during respondent's operations, no *testimony* to that effect was introduced. Four witnesses testified from personal observation as to the position of the tarpaulins on the hatch. Petitioner called the stevedore foreman who had loaded #1 hold, plus only one witness from all the men who were on the ship during the critical times. Respondent called its two employees who did the work in question. *There was no conflict among these four eyewitnesses as to the position of the tarpaulins.*

Respondent's two workmen who did the job testified that the tarpaulins covered the hatch when they arrived on the ship, and that this situation remained the same at all times before, during and after their work, until fire was noticed and the tarpaulins were *then* rolled back to gain access to the hold. (Eason, R. 81-2, 109, 112; Garrett, R. 128, 137.)

Of petitioner's two witnesses who testified about the tarpaulins, the stevedore foreman in charge of the prior stowage of #1 hatch testified that, when it was fully stowed, the pontoon covers were put in place and the tarpaulins were spread completely over the hatch. (Barkman, R. 15, 18.) Petitioner's night mate in charge of the vessel claimed not to have observed respondent's men at work, but testified

that the tarpaulins covered the hatch when he reported for duty (just before respondent's work began), and were in that same position after the work was done and when the fire was discovered. (Doeppner, R. 26-7, 40-41, 33, 45-6.)

Thus every witness who spoke on the subject at all agreed that *the tarpaulins covered the hatch each time he saw the hatch,* and there was no conflict whatever on that issue. Hence, respondent's work could only have caused a fire in #1 hatch by sparks burning their way through the tarpaulins and falling down the tiny cracks between the pontoons into the cargo beneath. It is undisputed that a careful inspection of the tarpaulins after the fire failed to disclose a single hole or burn in any of them.

It was on that state of the record that the Court of Appeals very properly reversed the District Court and held that petitioner had not sustained its burden of proof to show that the fire was caused by respondent's negligence.

Petitioner's statement of the case is erroneous in the last paragraph thereof in stating that the Court of Appeals merely re-evaluated the evidence for itself, without finding that the District Court's findings were "clearly erroneous." The opinion of the Court of Appeals does not purport to disregard the decision of the District Court, and petitioner is making a naked assumption when he charges the Court of Appeals with disregarding the law as to the scope of review on an admiralty appeal. As we shall point out in our argument, the Ninth Circuit has for some time followed the "clear error" rule laid down by this Court in *McAllister v. United States,* 348 U.S. 19, 99 L. Ed. (Adv.) 13, and it is an unwarranted assumption to say that any different rule was followed here.

THE QUESTION PRESENTED.

The petition makes a valiant effort to create or depict an "issue of law" relating to a conflict among the decisions as to the scope of review on an admiralty appeal. We will point out in our argument that there is no uncertainty or conflict, and that the Court of Appeals for the Ninth Circuit has consistently followed the rule laid down by this Court in *McAllister v. United States,* 348 U.S. 19, 99 L. Ed. (Adv.) 13. (*supra*).

Petitioner's efforts to paint a picture of an important question of law cannot disguise the fact that its basic objective is to have the facts reviewed by this Court after the Court of Appeals very carefully considered them and reversed the District Court's findings for lack of any substantial supporting evidence. In doing so, petitioner disregards the repeated holdings of this Court that it does not sit in judgment on questions of fact and conflicts of evidence, and that certiorari does not lie to determine whether the evidence supports the findings. *So. Power Co. v. N. Carolina Pub. Service Co.,* 263 U.S. 508, 68 L. Ed. 413.

The rule has been enunciated and applied by this Court in many cases, including the following:

> "We do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston,* 268 U.S. 220 at 227, 69 L. Ed. 925 at 926.
>
> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Co. v. Western Electric Co.,* 304 U.S. 175 at 178, 82 L. Ed. 1273 at 1275.

The rule is clearly stated at length in *National Labor Relations Board v. Pittsburg SS Co.,* 340 U.S. 498, 95 L. Ed.

479, in which this Court refused to consider factual issues where the Court of Appeals had reversed the findings of the Board for lack of evidentiary support. In that case the rule was thus set forth:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where, on a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. On such situations we should adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations." 340 U.S. 498 at 503, 95 L. Ed. 479 at 482-3.

That case was quoted and reaffirmed in *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 410; 96 L. Ed. 1027, 1040.

Let us now turn to the "legal issues" which petitioner attempts to raise.

ARGUMENT.

I.

THERE IS NO "CONFLICT" AMONG THE SUPREME COURT DECISIONS.

Petitioner quotes the recent decision in *McAllister v. U.S.* 348 U.S. 19, 99 L. Ed. (Adv.) 13, and contends that, since earlier decisions referred to an admiralty appeal being

a trial de novo, "clarification and settlement by this Court is required." The *McAllister* case is clear, positive and definite as to the scope of review in an admiralty appeal, and it is difficult to see how this Court could "clarify" that which is already clear as crystal. Without intending to be facetious, we suggest that petitioner is, in effect, arguing that a "no smoking" sign should be clarified to read "positively no smoking."

Petitioner cites *Brooklyn Eastern District Terminal v. U.S.*, 287 U.S. 170, 77 L. Ed. 240 (decided in 1932) as holding that an admiralty appeal is a trial de novo, and cites earlier decisions of this Court to that effect. Although the rule was so stated, it never meant that the appellate court disregarded the trial court's decision and retried the case anew. On the contrary, it was always the law that the district court's decision was presumptively correct, and should be reversed only when clearly against the weight of the evidence.

Whatever may have been the exact scope and effect of the rule laid down in decisions prior to 1932, this Court's decision last year in *McAllister v. U.S.*, 348 U.S. 19, 99 L. Ed. (Adv.) 13, has clearly settled the law, and, if it differs from the earlier decisions, has overruled them to that extent. No "clarification" is needed of this Court's pronouncement in *McAllister* that:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

Rule 52(a), F.R.C.P., provides that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. With this Rule and the clear statement in the *McAllister* case, this Court *has* clarified and settled the law as to the scope of review in an admiralty appeal. Earlier decisions are superseded, to the extent, if any, that they are in conflict with the *McAllister* decision, and the latter controls. No further "clarification and settlement" is possible or is necessary.

II.

THERE IS NO "CONFLICT AMONG THE CIRCUITS" TO BE SETTLED AT THIS TIME.

Petitioner cites and quotes earlier decisions from various Circuits in an effort to show that they do not agree as to the scope of appellate review of admiralty findings, and that the Ninth Circuit is somehow out of line. Petitioner's alleged "differences" are differences of form, not substance, and are chiefly based on variations in language which merely express the same rule in different ways.

In recent times all Circuits have followed the same general rule, but have stated it in different words with varying emphasis. Where all the testimony was in open court, the appellate court has sometimes stressed the presumption in favor of the District Court's findings because of its superior opportunity to judge the witnesses' credibility. In others, where much of the testimony was by deposition, the appellate court has emphasized its duty to review the entire record and its power to reject clearly erroneous findings. Such differences in expression merely present the two sides

of the same coin, and do not evidence a disagreement as to the fundamental rule of review.

If there ever *was* a real difference among the Circuits, this Court's pronouncement in the *McAllister* case has composed the difference and set forth clearly and succinctly the rule which is to prevail in all admiralty appeals. Thus the so-called need for a "settlement" among the Circuits no longer exists. The rule has already been "settled and clarified" in the *McAllister* case.

Nor is it fair to say that, in this case, the Ninth Circuit ignored the District Court's decision, or failed to follow the correct rule as to scope of review. Petitioner is hopefully assuming something here, merely because the Court of Appeals did not preface its opinion with another statement of the rule. The Ninth Circuit has repeatedly expressed the rule which it applies in reviewing findings in an admiralty appeal, and there was no need for the Court of Appeals to do so again. It did *not* say that it was *departing* from its settled rule, and it must be taken that the Court of Appeals followed and applied the same principles which it has consistently observed both before and after its decision in this case.

The Ninth Circuit has steadily followed the rule which the *McAllister* case announces, and mere variations in the language used to express the rule do not indicate any change in the rule, itself.

The *Ernest H. Meyer* (9 Cir.), 84 F.(2nd) 496, decided in 1936, expressly states that the trial court's findings in an admiralty case will not be disturbed unless "*clearly* against the weight of the evidence." That case, and later decisions of the Ninth Circuit, do point out that the weight to be given the findings of the trial court is lessened where part of the

testimony below was by deposition. This does not clash with the *McAllister* case, but is in harmony with that part of Rule 52(a), F.R.C.P., which refers to "the opportunity of the trial court to judge of the credibility of the witnesses . . ." Where deposition evidence is concerned, the trial court has no greater opportunity to appraise credibility than does the appellate court.

In *The Ernest H. Meyer* case, the losing party sought certiorari on the ground, among others, that the appellate court had applied the wrong standard of review and was not in harmony with other circuits. Certiorari was denied *sub nom. Hammond Lumber Co. v. Broughton & Wiggins Nav. Co.*, 299 U.S. 600, 81 L. Ed. 443 (No. 463, Oct. term, 1936).

Subsequent to *The Ernest H. Meyer* decision in 1936, the Ninth Circuit has repeatedly held that findings of the lower court will not be set aside unless clearly erroneous, and that the findings are to be given special weight when based on testimony in court by witnesses whose credibility could better be appraised by the trial judge.

> "The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed." *Bornhurst v. U.S.* (9 Cir. 1947), 164 F. (2nd) 789, 790; *Meintsma v. U.S.* (9 Cir. 1947), 164 F. (2nd) 976, 977, and *Stetson v. U.S.*, (9 Cir. 1946), 155 F. (2nd) 359, 361.
>
> "The testimony was all given orally in the presence of the Trial Court and if the findings are supported by substantial evidence and are not clearly erroneous, they should stand undisturbed on this appeal." *Rocona v. Guy F. Atkinson Co.* (9 Cir. 1949), 173 F.(2nd) 661, 663.
>
> "The findings are supported by substantial evidence, are not clearly erroneous, and hence are accepted

by us as correct." *Fiamengo v. The San Francisco,* (9 Cir. 1949), 172 F.(2nd) 767, 768.

"To the extent it is urged that the District Court resolved the factual issues against the weight of the evidence, we are limited in the scope of our review by the general rule in admiralty proceedings that the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous." *Kulukundis v. Strand* (9 Cir. 1953), 202 F.(2nd.) 708, 709-10.

"In an admiralty case in which all the testimony is oral the findings of fact are presumptively correct, and being supported by substantial evidence, we accept them." *Hertz vs. Consolidated Fisheries* (9 Cir. 1954) 213 F.(2nd) 801, 803.

Petitioner cites *City of Portland v. Luckenbach SS Co.,* (9 Cir. 1954), 217 F.(2nd) 894, as if it somehow weakened the rule of previous cases. That decision was written by a District Judge sitting *pro tem,* who used different phraseology. The case as a whole, however, shows that the Ninth Circuit refused to disturb the lower court's findings because it did not find them clearly erroneous. Thus the opinion says, in part:

"On the whole, after going over the entire testimony, we think that the question of negligence and the related matters of causation and last clear chance were very close questions. Assuming that Luckenbach had the burden of proof, the evidence taken favorably in behalf of Luckenbach supports the trial judge. Close as the questions on the facts seem to be, we have no firm conviction or definite belief that he was wrong. Therefore, we do not disturb his findings." 217 F.(2nd) at p. 898.

That the Ninth Circuit recognizes and follows the *McAllister* rule is demonstrated in its very recent decision, not

yet published, in *Long Beach v. American President Lines* (#13,972 in the Ninth Circuit, decided June 14, 1955; to appear in 222 or 223 F.(2nd.)—). That case was an admiralty appeal in which the findings below were attacked as erroneous. Judge Chambers, speaking for the Court of Appeals, thus recognized the *McAllister* decision:

> "The ghost of trial de novo in this intermediate appellate court has been laid to rest with finality in *McAllister v. U.S.*, 348 U.S. 19."

And, later in the opinion:

> "Sifting the evidence, we arrive at a place short of an abiding conviction that the trial judge was clearly erroneous in his conclusions on negligence. We do think if we had had the opportunity to see and hear Capt. Wilson and Capt. Halvorsen we would have had little trouble arriving at a conclusion as to which had overrationalized the experiences of the day. The trial court could take its choice."

That opinion was written by Judge Chambers, who also participated in the decision of the case at bar. We consider it proper to say that, during oral argument of this case before the Court of Appeals, the *McAllister* case (decided after the briefs were filed in the Ninth Circuit) was cited, quoted and called to the attention of the Court of Appeals by petitioner's counsel. The Court of Appeals judges who were hearing the oral argument noted the citation, and Judge Orr commented that this appeared to be the same rule which the Ninth Circuit had been following for some time. Petitioner's counsel stated that this was correct.

Petitioner is now hopefully asking this Court to *assume* that the Court of Appeals disregarded its own previous holdings and the holding of the *McAllister* case, although all those considerations were brought to its attention, and

although the opinion does *not* state that the trial court decision is disregarded or given less than the proper weight and consideration. It is not necessary for a Court of Appeals to restate the rule as to its scope and power of review in every opinion it writes. The rule exists and is applied. It need not be repeated in every decision, and did not have to be stated here. It was obeyed, and that is enough.

III.

UNDER THE STANDARD SET DOWN IN RULE 52(a), F.R.C.P., AND THE McALLISTER CASE, THE COURT OF APPEALS CORRECTLY REVERSED THE FINDING OF THE DISTRICT COURT.

Petitioner's last point attempts to re-argue the facts, but omits to mention or comment on the evidence which we have pointed out in our statement of the case. The material evidence, on which the Court of Appeals reversed the District Court finding of causation was this:

There were four witnesses who had seen #1 hatch at various times. Two of them saw it during the respondent's work, one saw it at the conclusion of the prior loading, and the fourth saw it just before and just after respondent's work was done. All four agreed that the hatch was covered with three tarpaulins every time they saw it, and *there was no conflict among them* on that point. *No one* testified that the hatch was *ever* uncovered before the fire. Petitioner did not call any of the other men on the ship, although others were there.

On the day after the fire, before reloading was even begun, petitioner went to the trouble and expense of having the pontoons replaced in #1 hatch and the tarpaulins spread

over the pontoons, so that the tarpaulins could be examined for holes. *The mere fact that petitioner arranged for this inspection shows that petitioner knew the tarpaulins had been in place during respondent's work.* If this were not true, the "post mortem" examination was a complete waste of time, since the presence or absence of holes would mean nothing if the tarpaulins had been rolled back during respondent's operation.

By the uncontradicted evidence of all four eye-witnesses and petitioner's failure to call other available witnesses, and by the admission implicit in petitioner's arranging for examination of the tarpaulins the next day, the tarpaulins covered the hatch at all times, and sparks from respondent's work on deck could set fire to the cargo only by burning through the tarpaulins and falling, still alive, through the crevices between pontoons onto the cargo.

It being conceded that no burns or holes were found in the tarpaulins, obviously respondent's work did not cause the fire.

On that state of the record the Court of Appeals properly reversed for lack of evidence to sustain the essential finding. The Court of Appeals did not merely evaluate the testimony differently from the District Court, and did not reach different conclusions as to credibility of witnesses, but found that there was *no* evidence to support petitioner's burden of proof. As the concluding paragraph of the Court of Appeals' opinion puts it:

> "With the not remote possibility that a long smouldering fire was started by a burning cigarette butt dropped by one of the fourteen stevedores and the *absence* of *any* testimony that the tarpaulin was raised, we think that *the shipowner did not sustain its burden*

of proof that the fire injuring the ship's structure was started by the use of the acetylene torch." (p. iv of suppl. to Petition)

CONCLUSION.

The alleged "conflict among the circuits" is not a conflict at all as to the scope of review in an admiralty appeal, but merely a difference in phraseology, at most. If there ever was any disagreement, the decision of this Court in the *McAllister* case has settled the dispute and has clearly laid down the rule to be followed. No further "clarification" or "settlement" is required. The Ninth Circuit has followed that same rule for many years, and has expressly recognized the *McAllister* statement of the rule in its latest decision.

Thus there are no legal questions presented, of any sort. Petitioner seeks merely to have this Court review the facts of the particular case. That the petition for certiorari should be denied is

Respectfully submitted,

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Dated, San Francisco, California,
July 15, 1955.